

**Letter of Findings: 04-20110233
Sales and Use Tax
For Tax Years 2008 and 2009**

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ISSUE

I. Sales Tax – Imposition – Hotel Room Rentals.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-4; IC § 6-2.5-4-4; IC § 6-2.5-5-1 et seq.; IC § 6-2.5-5-16; IC § 6-2.5-5-24; IC § 6-2.5-5-25; IC § 6-2.5-8-8; IC § 6-8.1-5-1; [45 IAC 2.2-4-8](#); [45 IAC 2.2-5-24](#); [45 IAC 2.2-5-25](#); [45 IAC 2.2-8-12](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974); Sales Tax Information Bulletin 4 (August 2008); Sales Tax Information Bulletin 10 (June 2008).

Taxpayer protests the imposition of sales tax on room rentals to members of not-for-profit organizations and government employees.

STATEMENT OF FACTS

Taxpayer is a partnership that operates several hotels in Indiana. The Indiana Department of Revenue ("Department") conducted a sales/use tax audit of Taxpayer for 2008 and 2009 tax years. Pursuant to the audit, the Department determined that Taxpayer failed to collect and remit sales tax on certain retail transactions, including, but not limited to, hotel room rentals, movie rentals, and rollaway bed rentals. The Department's audit also assessed use tax because Taxpayer failed to pay sales tax at the time of its purchases or to self-assess and remit the use tax due to the Department.

Taxpayer only protested the audit's assessment on its hotel room rentals which individuals (hotel guests) claimed were exempt because they were members of not-for-profit organizations or government employees. A hearing was held and this Letter of Findings ensues. Additional information will be provided as required.

I. Sales Tax – Imposition – Hotel Room Rentals.

DISCUSSION

The Department assessed Taxpayer additional sales tax on certain hotel rooms rented to individuals for which Taxpayer did not collect sales tax for 2008 and 2009 tax years. Specifically, the Department's audit found that Taxpayer did not collect sales tax on rooms rented to its hotel guests who claimed exempt from sales tax, including members of various not-for-profit organizations and employees of the federal government.

Taxpayer, to the contrary, asserted that it was not responsible for the sales tax because its hotel guests provided exempt certificates. Taxpayer protested that the hotel guests in question were either governmental employees or members of exempt organizations. Taxpayer maintained that "when presented with tax exemption certificates by our guests issued by the State of Indiana stating an organization is tax exempt we then exempt them from the Sales tax." Taxpayer added that, under the federal law, it is "required to keep all stay information confidential and this includes all customers no matter how they are paying." Taxpayer further maintained that since it was required "to truncate Credit Card information," it would not know whether "the Credit Cards are personal or Company Cards."

As a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). In accordance with IC § 6-2.5-2-1(b) while the acquirer of the tangible personal property is liable for the sales tax, charged by the retail merchant as a separate added amount, the retail merchant collects the tax as an agent for the state. There are exemptions available for sales tax. IC § 6-2.5-3-4, IC § 6-2.5-5-1 et seq. A statute which provides a tax exemption, however, is strictly construed against the taxpayer. Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). "[W]here such an exemption is claimed, the party claiming the same must show a case, by sufficient evidence, which is clearly within the exact letter of the law." Id. at 100-01.

The sales tax is imposed on certain rental transactions including the rental of hotel rooms. IC § 6-2.5-4-4 states:

(a) A person is a retail merchant making a retail transaction when the person rents or furnishes rooms, lodgings, or other accommodations, such as booths, display spaces, banquet facilities, and cubicles or spaces used for adult relaxation, massage, modeling, dancing, or other entertainment to another person:

(1) if those rooms, lodgings, or accommodations are rented or furnished for periods of less than thirty (30) days; and

(2) if the rooms, lodgings, and accommodations are located in a hotel, motel, inn, tourist camp, tourist cabin, gymnasium, hall, coliseum, or other place, where rooms, lodgings, or accommodations are regularly furnished for consideration.

(b) Each rental or furnishing by a retail merchant under subsection (a) is a separate unitary transaction regardless of whether consideration is paid to an independent contractor or directly to the retail merchant.

[45 IAC 2.2-4-8](#) elaborates:

(a) For the purpose of the state gross retail tax and use tax: Every person engaged in the business of renting or furnishing for periods of less than thirty (30) days any accommodation including booths, display spaces and banquet facilities, in any place where accommodations are regularly furnished for a consideration is a retail merchant making retail transactions in respect thereto and the gross income received therefrom shall constitute gross retail income from retail unitary transactions.

(b) In general, the gross receipts from renting or furnishing accommodations are taxable. An accommodation which is rented for a period of thirty (30) days or more is not subject to the gross retail tax.

(c) There is no exemption for purchases made by persons who are engaged in renting or furnishing accommodations. Such persons are deemed to purchase or otherwise acquire tangible personal property for use or consumption in the regular course of their business.

(d) The renting or furnishing of an accommodation for less than thirty (30) days constitutes a retail merchant making a retail transaction. Every person so engaged must collect the gross retail tax on the gross receipts from such transactions. The tax is borne by the person or organization who uses the accommodation.

(e) The tax is imposed on the gross receipts from "furnishing" an accommodation. The gross receipts subject to tax include the amount which represents consideration for the rendition of those services which are essential to the furnishing of the accommodation, and those services which are regularly provided in furnishing the accommodation. Such amounts are subject to tax even when they are separately itemized on the statement or invoice.

(f) The tax is imposed on the gross receipts from accommodations which are furnished for periods of less than thirty (30) days.

IC § 6-2.5-5-16 states:

Transactions involving tangible personal property, public utility commodities, and public utility service are exempt from the state gross retail tax, if the person acquiring the property, commodities, or service:

(1) is the state of Indiana, an agency or instrumentality of the state, a political subdivision of the state, or an agency or instrumentality of a political subdivision of the state, including a county solid waste management district or a joint solid waste management district established under [IC 13-21](#) or [IC 13-9.5-2](#) (before its repeal); and

(2) predominantly uses the property, commodities, or service to perform its governmental functions.

Next, IC § 6-2.5-5-24(a) states:

Transactions are exempt from the state gross retail tax to the extent that the gross retail income from those transactions is derived from gross receipts that are:

(1) **derived from sales to the United States government, to the extent the state is prohibited by the Constitution of the United States from taxing that gross income;**

(2) derived from commercial printing that results in printed materials, excluding the business of photocopying, that are shipped, mailed, or delivered outside Indiana;

(3) United States or Indiana taxes received or collected as a collecting agent explicitly designated as a collecting agent for a tax by statute for the state or the United States;

(4) collections by a retail merchant of a retailer's excise tax imposed by the United States if:

(A) the tax is imposed solely on the sale at retail of tangible personal property;

(B) the tax is remitted to the appropriate taxing authority; and

(C) the retail merchant collects the tax separately as an addition to the price of the property sold;

(5) collections of a manufacturer's excise tax imposed by the United States on motor vehicles, motor vehicle bodies and chassis, parts and accessories for motor vehicles, tires, tubes for tires, or tread rubber and laminated tires, if the excise tax is separately stated by the collecting taxpayer as either an addition to or an inclusion in the price of the property sold; or

(6) amounts represented by an encumbrance of any kind on tangible personal property received by a retail merchant in reciprocal exchange for tangible personal property of like kind. (**Emphasis added**).

[45 IAC 2.2-5-25](#) provides:

(a) **There is not a blanket exemption from the sales tax for purchases by governmental agencies and units. It provides that only the purchase of tangible personal property used by the governmental agency in connection with a governmental function may be purchased exempt from sales tax.**

(b) **Purchases by a governmental agency or subdivision to be used in connection with or for a proprietary activity are subject to the sales tax.**

(c) Proprietary activities by governmental agencies and subdivisions include:

(1) Activities in connection with the sale of tangible personal property, such as college book stores, food

services, concessions, etc.

(2) Activities in connection with the rental of tangible personal property made to the general public.

(d) In every case in which a governmental agency engages in a proprietary type activity as defined above, the agency must pay sales tax on the purchase of all tangible personal property used in connection therewith.

(e) The construction of buildings and structures for use in proprietary activities such as concession stands, is subject to sales tax on the tangible personal property incorporated therein.

(f) Governmental agencies should refer to the gross income tax regulations and instructions for other examples of proprietary type activities. **(Emphasis added).**

[45 IAC 2.2-5-24](#)(e), in relevant part, states:

Purchases must be invoiced directly to the governmental entity and paid out of governmental funds.

Purchases of tangible personal property, public utility services, and commodities by the state or a subdivision thereof are exempt from gross retail tax, provided the purchases are invoiced directly to the governmental entity and paid for out of government funds. Purchases which are for use by the governmental entity, but which are not invoiced directly to the state or subdivision or are not paid for out of governmental funds, are subject to the gross retail tax. **(Emphasis added).**

Next, IC § 6-2.5-5-25 states:

(a) **Transactions involving tangible personal property or service are exempt from the state gross retail tax, if the person acquiring the property or service:**

(1) **is an organization described in section 21(b)(1) of this chapter;**

(2) primarily uses the property or service to carry on or to raise money to carry on its not-for-profit purpose; and

(3) is not an organization operated predominantly for social purposes.

(b) Transactions occurring after December 31, 1976, and involving tangible personal property or service are exempt from the state gross retail tax, if the person acquiring the property or service:

(1) is a fraternity, sorority, or student cooperative housing organization described in section 21(b)(1)(A) of this chapter; and

(2) uses the property or service to carry on its ordinary and usual activities and operations as a fraternity, sorority, or student cooperative housing organization. **(Emphasis added).**

IC § 6-2.5-8-8 states:

(a) A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. The person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a **proper** exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.

(b) The following are the only persons authorized to issue exemption certificates:

(1) retail merchants, wholesalers, and manufacturers, who are registered with the department under this chapter;

(2) organizations which are exempt from the state gross retail tax under [IC 6-2.5-5-21](#), [IC 6-2.5-5-25](#), or [IC 6-2.5-5-26](#) and which are registered with the department under this chapter; and

(3) other persons who are exempt from the state gross retail tax with respect to any part of their purchases.

(c) The department may also allow a person to issue a blanket exemption certificate to cover exempt purchases over a stated period of time. The department may impose conditions on the use of the blanket exemption certificate and restrictions on the kind or category of purchases that are exempt.

(d) A seller that accepts an incomplete exemption certificate under subsection (a) is not relieved of the duty to collect gross retail or use tax on the sale unless the seller obtains:

(1) a fully completed exemption certificate; or

(2) the relevant data to complete the exemption certificate;

within ninety (90) days after the sale.

(e) If a seller has accepted an incomplete exemption certificate under subsection (a) and the department requests that the seller substantiate the exemption, within one hundred twenty (120) days after the department makes the request the seller shall: (1) obtain a fully completed exemption certificate; or (2) prove by other means that the transaction was not subject to state gross retail or use tax. **(Emphasis added).**

Finally, [45 IAC 2.2-8-12](#) provides:

(a) Exemption certificates may be issued [sic.] only by purchasers authorized to issue such certificates by the Department of Revenue. Retail merchants, manufacturers, wholesalers and others who must register with the Department of Revenue and who qualify to purchase exempt from tax under this Act [\[IC 6-2.5\]](#) may issue exemption certificates with respect to exempt transactions. All persons or entities not required to register with the Department as retail merchants, manufacturers, or wholesalers, and who are exempt under this Act [\[IC 6-2.5\]](#) with respect to all or a portion of their purchases are authorized to issue exemption certificates with respect to exempt transaction provided an exemption number has been assigned by the Department of Revenue, or provided that the Department of Revenue has specifically provided a form and manner for

issuing exemption certificates without the need for assigning an exemption number.

(b) Retail merchants are required to collect the sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used by the purchaser for an exempt purpose.

(c) All retail sales of tangible personal property for delivery in the state of Indiana shall be presumed to be subject to sales or use tax until the contrary is established. **The burden of proof is on the buyer and also on the seller unless the seller receives an exemption certificate.**

(d) Unless the seller receives a properly completed exemption certificate the merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose. It is, therefore, very important to the seller to obtain an exemption certificate in order to avoid the necessity for such proof. The mere filing of a Registered Retail Merchant Certificate number is not sufficient to relieve the seller of the responsibility to collect the sales tax or prove exempt use by the buyer.

(e) No exemption certificates are required for sales in interstate commerce, however, proper records must be maintained to substantiate such sales.

(f) An exemption certificate issued by a purchaser shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such form is completed.

(g) An exemption certificate or other evidence supporting an exempt sale must be maintained by the seller for at least three (3) years after the due date of the tax return upon which such exempt transaction is reported.

(h) Exemption certificates may be reproduced provided no change is made in the wording or content.

(Emphasis added).

Read together, these statutes and regulations provide that a hotel operator is a retail merchant when renting accommodations for less than thirty days. However, certain sales and rentals are exempt from sales and use tax when the purchaser or renter is the federal government or an exempt organization.

In its audit report, the Department referred to Sales Tax Information Bulletin 4 (August 2008), 20080827 Ind. Reg. 045080656NRA, which explained that sales to local, state, or federal government employees were exempt only if the government directly paid for those purchases. If the employee paid for the purchase directly, the exemption did not apply even if the employee were to be reimbursed by the government for the purchase. Likewise, the Department also referred to Sales Tax Information Bulletin 10 (June 2008), 20080702 Ind. Reg. 045080515NRA, which explained that if a member of an exempt organization directly paid for a purchase, that transaction was taxable even if the exempt organization would reimburse the member.

Taxpayer believes that the room rentals in question are exempt under either IC § 6-2.5-5-16, IC § 6-2.5-5-24, or IC § 6-2.5-5-25, since the hotel guests were federal government employees or were members of exempt organizations. Taxpayer states that these guests presented exemption certificates supporting their claim of exemption. However, as explained by the two Information Bulletins referenced above, sales to the exempt organizations are direct sales to the exempt organizations, not to the members. IC § 6-2.5-5-16, IC § 6-2.5-5-24, and IC § 6-2.5-5-25 all provide that the relevant exemptions apply to sales to the organizations, not individuals. If the individuals pay for the rooms, those transactions are then between the hotel and the individual. Even if the exempt organization or government later reimburses the individual, the initial transaction was between the hotel and a non-exempt person.

Therefore, each exempt hotel room rental consists of two steps. The first step is to present a properly completed exemption certificate. The second step is to present payment by the exempt organization or governmental organization and confirm that the exemption certificate is actually being used by the exempt organization listed on the exemption certificate. Both steps are necessary and are immediately verifiable. These steps are verifiable by any retail merchant, including but not limited to hotels. The Department has issued clear guidance on the treatment of the transactions at issue pursuant to the above mentioned statutes and regulations.

Taxpayer's documentation includes copies of exemption certificates (Form ST-105s), which were provided by its hotel guests. However, upon reviewing Taxpayer's documentation, majority of its hotel guests at issue selected the box of "Sales to nonprofit organizations claiming exemption pursuant to Sales Tax Information Bulletin 10." The same exemption certificates also expressly contain the language of "(May not be used for personal hotel rooms and meals.)," informing both Taxpayer and its hotel guests that "personal hotel rooms" are not exempt transactions. While some hotel guests at issue claimed to be the federal government employees, Taxpayer did not provide documentation demonstrating that the federal government paid the hotel room rental directly.

Thus, given the totality of the circumstances, in the absence of other documentation, the Department is not able to agree that Taxpayer has met its burden showing that the transactions were indeed exempt. Therefore, the Department's audit properly imposed sales tax on these transactions.

FINDING

Taxpayer's protest is respectfully denied on this issue.

Posted: 04/25/2012 by Legislative Services Agency

